

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6509

DATE COMPLAINT FILED: November 4, 2011

DATE OF NOTIFICATION: November 9, 2011

LAST RESPONSE RECEIVED: Jan. 12, 2012

DATE ACTIVATED: January 24, 2012

EXPIRATION OF SOL: Earliest: December 3, 2015

Latest: December 22, 2016

COMPLAINANT: Citizens for Responsibility and Ethics in
Washington (CREW)

RESPONDENT: Friends of Herman Cain, Inc. and Mark J. Block,
in his official capacity as treasurer
Prosperity USA, Inc. and Mark J. Block,
as President

RELEVANT STATUTES: 2 U.S.C. § 434(b)
2 U.S.C. § 441b(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: none

I. INTRODUCTION

A Complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW") alleges that Prosperity USA, Inc. ("PUSA"), a non-profit corporation under Section 501(c)(3) of the Internal Revenue Code, made unreported corporate in-kind contributions to Friends of Herman Cain, Inc., the authorized committee of presidential candidate Herman Cain, by paying expenses related to Cain's presidential exploratory activity before he declared his candidacy for the Republican presidential nomination, in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). Specifically, the Complaint asserts that PUSA paid for travel expenses for Cain and his

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1 staff and iPads for campaign staff in violation of 2 U.S.C. § 441b(a). The Complaint
2 includes a purported internal PUSA ledger listing some of those expenses. The Complaint
3 further alleges that Friends of Herman Cain, Inc., and its treasurer Mark J. Block (the
4 "Cain Committee"), failed to report the advances as debts in violation of
5 2 U.S.C. § 434(b)(8).

6 The response filed by the Cain Committee acknowledges that PUSA may have
7 funded certain Cain Committee activities. It disputes, however, that every expense listed
8 in the ledger was campaign related and asserts that some were incurred before Cain
9 became a candidate or began "testing the waters" for his candidacy. No response was
10 submitted on behalf of PUSA.

11 The Office of General Counsel ("OGC") recommends that the Commission find
12 reason to believe that PUSA made, and the Cain Committee accepted prohibited corporate
13 contributions, and that the Cain Committee failed to report these amounts as in-kind
14 contributions or debts owed to PUSA. OGC also recommends that the Commission
15 approve the attached Factual and Legal Analyses and open an investigation into this matter
16 to determine the scope of the violations.

17 **II. FACTS**

18 Mark Block and Linda Hansen are Wisconsin-based political consultants who
19 founded and ran PUSA. The entity is incorporated as a Wisconsin not-for-profit
20 corporation, and its Articles of Incorporation indicate that it is operated as a Section
21 501(c)(3) public interest organization under the Internal Revenue Code. See Complaint,

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1 Ex. 1.¹ PUSA is reportedly connected to Americans for Prosperity, a non-profit "that
2 helped organize the tea party movement in Wisconsin and elsewhere." Complaint, Ex. 3.
3 Mark Block is the president of PUSA.

4 The Cain Committee is the principal campaign committee of Herman Cain, then a
5 candidate for the Republican presidential nomination. Cain declared his candidacy for
6 president on May 3, 2011, and filed a statement of organization for the Cain Committee on
7 the same day. In its first quarterly disclosure report, filed on July 20, 2011, the Cain
8 Committee reported that it incurred "testing the waters" activity beginning
9 December 29, 2010.² Block is the treasurer of the Cain Committee and served as chief of
10 staff for the political campaign. According to the Complaint, "at all [relevant] times" he
11 simultaneously served as president of PUSA. Complaint at 3 & Ex. 3. Linda Hansen is
12 reportedly the deputy chief of staff for Cain. Complaint, Ex. 3.

13 The Complaint alleges violations of the Act premised on internal PUSA ledgers
14 made public in the *Milwaukee Journal Sentinel*. The Complaint provided selected pages
15 of those ledgers, which appear to be part of an internal PUSA accounting system,
16 containing "Profit & Loss" statements and a "balance sheet." Complaint, Ex. 4.
17 The ledgers also contain a list of accounts receivable as of February 10, 2011, including
18 amounts putatively "Due from FOH:"

¹ Block established a Wisconsin non-profit corporation on April 10, 2010, using the name America's Prosperity Network, Inc. He changed the name of the corporation to Prosperity USA, Inc. by filing an amendment to the Articles of Incorporation on August 30, 2010. See Complaint, Exs. 1, 2.

² According to press reports, Cain announced the suspension of his candidacy for the Republican presidential nomination on December 3, 2011.

**Table 1: PUSA Accounts Receivable
 "Due from FOH" as of Feb. 10, 2011**

Description	Amount
Atlanta Invoice 002	\$14,779.25
Hill Aircraft Invoice 002	\$16,669.94
Travel & Meetings IA, LA, Las Vegas, Houston-Dallas Invoice #001	\$5,900.32
1/4/2011 Invoice for Ipads	\$3,764.14
TOTAL	\$41,113.65³

On October 30, 2011, the *Milwaukee Journal Sentinel* reported that internal PUSA financial records reflected a debt "of about \$40,000" owed to PUSA from the Cain Committee. See Daniel Bice, *State Firm's Cash to Herman Cain May Breach Federal Campaign, Tax Laws*, MILWAUKEE J. SENTINEL (Oct. 30, 2011) (attached to the Complaint as Ex. 3) ("the Bice Article"). The Bice Article stated that PUSA "helped [Cain] get his fledgling campaign off the ground by originally footing the bills for tens of thousands of dollars of expenses. . . ." *Id.*

Based on these ledger entries and the Bice Article, the Complaint alleges that PUSA knowingly and willfully made prohibited corporate contributions on behalf of the Cain Committee, which the Cain Committee accepted and failed to report. Complaint at 4-5.

³ The February 10, 2011 ledger does not identify the dates on which travel expenses were incurred, but those expenses are listed among others that incurred between December 28, 2010 and January 7, 2011. The accounts receivable ledger includes three additional entries totaling \$252.72, allegedly incurred by Block but "due from [FOH]," containing an annotation, "Mark may repay." Complaint, Ex. 4.

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1 In its Response, the Cain Committee addresses most of the items listed among the
2 putative accounts receivable and acknowledges the accuracy of several of those alleged
3 Cain Committee debts. As to certain other entries, the Cain Committee asserts that the
4 amounts were PUSA obligations, not advances on behalf of the Cain Committee.
5 Concerning the \$14,779.25 "Atlanta invoice," *see* Table 1, *supra*, the Cain Committee
6 admits the fact of a December 3-4, 2010 meeting in Atlanta "to discuss the results of the
7 2010 elections." Response at 3. And the Response concludes that "upon reviewing the
8 events that took place . . . it might be argued that this meeting . . . might be considered a
9 'testing-the-waters' event. . . . [The Cain Committee] will be amending their reports
10 accordingly, to include these expenses." *Id.* at 3-4. In its recently-filed
11 2012 April Quarterly disclosure report, the Cain Committee reported a disbursement to
12 PUSA for \$14,779.25 for "Lodging/Transportation/Meals" made on January 20, 2012.
13 With respect to the other apparent travel-related expenses, however, including the
14 "Hill Aircraft" invoice and expenses related to "Travel & Meetings IA, LA, Las Vegas,
15 Houston-Dallas," the Response does not contest the expenses but denies they were
16 prohibited contributions because they "appear to be trips made solely for purposes
17 unrelated to either Mr. Cain's exploratory committee or his candidacy for president.
18 As such, these are not expenses that are attributable to the Cain Committee."
19 Response at 4. Rather, according to the Response, the identified travel expenses involved
20 "meetings related to Americans for Prosperity, a group which regularly involved Mr. Cain
21 in events, and with which Mr. Block was also involved." *Id.* at 4 n.1. The Response does

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1 not explain why PUSA's apparent ledger includes those expenses among the debts

2 "Due from FOH."⁴

3 In addition to travel-related expenses, the Complaint alleges that PUSA paid
4 \$3,764.14 for iPads for Cain Committee staff that was unreimbursed and not reported on
5 Cain Committee disclosure reports. The ledger itemized the iPads expense with an entry
6 reading, "Not billed to FOH yet, but due from them." Complaint, Ex. 4. The ledger
7 further indicated that the amount was invoiced January 4, 2011 and "emailed to Scott,
8 Mark." *Id.* The Response admits that PUSA paid for iPads used by members of the Cain
9 Committee staff, and neither disputes the value assigned to the iPads nor the allegation that
10 PUSA was not reimbursed:

11 These iPads were used by various individuals who worked at
12 Prosperity USA prior to joining the Cain Committee. These
13 individuals believed that the iPads, which they received as employees
14 of PUSA, were theirs to keep (*i.e.*, the iPads were given to them to
15 keep and were later brought with the individuals when they came to
16 work for the Cain Committee). While this would be allowed under the
17 FEC Rules, the Cain Committee will nonetheless be amending the
18 proper FEC reports to reflect the listed expenses for iPads as expenses
19 of the campaign.

20 Response at 3. In its recently-filed 2012 April Quarterly disclosure report, the Cain

21

⁴ Filed disclosure reports indicate that, beginning February 2011, the Cain Committee's sole air travel vendor was Hill Aircraft. From February to November 2011, the Cain Committee made ten payments to Hill Aircraft totaling approximately \$300,000.

1 Committee reported a disbursement to Wisconsin Prosperity Network⁵ for \$3,764.14 for
 2 "Office Equipment" made on January 20, 2012.⁶

3 The Cain Committee raises two general arguments as to why the Commission
 4 should take no action in the matter. First, it questions the source and veracity of the
 5 ledgers, noting that the purported ledgers are identified further as drafts, and for all of
 6 these reasons contends they are unreliable. Resp. at 2. Second, the Response argues that
 7 the allegations in the Complaint are not adequately specific for the Respondent to
 8 understanding "what actions led to a violation." See Resp. at 2.

9 **III. FACTUAL AND LEGAL ANALYSIS**

10 The Act prohibits any corporation from making a contribution to a political
 11 committee and similarly prohibits political committees from accepting or receiving such
 12 contributions. 2 U.S.C. § 441b(a). A "contribution" includes "any gift, subscription, loan,
 13 advance, or deposit of money or anything of value made by any person for the purpose of
 14 influencing any election for federal office." *Id.* § 431(8)(A)(i). The Commission's
 15 regulations provide that "anything of value" includes all in-kind contributions, including
 16 the provision of goods or services without charge or at a charge which is less than the

⁵ The Bice Article provides a link to online copies of the incorporation records for Wisconsin Prosperity Network. See Bice Article. Those records reflect that Wisconsin Prosperity Network, like PUSA, is a 501(c)(3) organization and Mark Block is its President. According to the Bice Article, Wisconsin Prosperity Network was intended to function as "an umbrella organization that would spend more than \$6 million a year underwriting a dozen or so other conservative groups." See *id.*

⁶ The Response also states that, although not alleged specifically in the Complaint, the Cain Committee's internal review has shown that furniture purchased by PUSA was passed through common employees to the Cain Committee as the Cain Committee began operations. The Cain Committee states that it "could, in good faith, argue that these [expenses] are not reportable, but to avoid any suggestion of impropriety, will nonetheless amend the necessary report to reflect the value of this furniture." See Resp. at 4. In its April 2012 Quarterly disclosure report, the Cain Committee lists a \$300 disbursement to Wisconsin Prosperity Network made on January 29, 2012, for "office furniture," which likely is the furniture in question.

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1 usual and normal charge for such goods or services. 11 C.F.R. § 100.52(d)(1).
2 The amount of the in-kind contribution is the difference between the usual and normal
3 charge for the goods or services at the time of the contribution and the amount charged to
4 the political committee. *Id.* The usual and normal charge for goods means the price of
5 those goods in the market from which they ordinarily would have been purchased at the
6 time of the contribution. *Id.* § 100.52(d)(2).

7 The Complaint alleges that PUSA made prohibited in-kind contributions to the
8 Cain Committee by advancing the costs of travel and iPads while Cain was "testing the
9 waters" before he announced his candidacy and designated his authorized committee.
10 Under the Commission's regulations, an individual who has not decided to run for office
11 may "test the waters" by raising and spending funds while he or she is making that
12 decision. *Id.* §§ 100.72, 100.131. These funds may be raised and used for the limited
13 purpose of determining whether an individual should become a candidate. *Id.* Only funds
14 permissible under the Act may be used for such activities. *Id.*

15 Section 434(b)(8) of the Act requires committees to disclose the nature and amount
16 of outstanding debts and obligations in their reports. These debts and obligations must be
17 continuously reported until they are extinguished. 11 C.F.R. § 104.11(a). Debts of \$500
18 or less must be reported no later than 60 days after the obligation is incurred, while debts
19 exceeding \$500 must be reported when incurred. *Id.* § 104.11(b). All political committees
20 are required to file reports of their receipts and disbursements. 2 U.S.C. § 434(a).
21 These reports must itemize all contributions received from contributors that aggregate in
22 excess of \$200 per election cycle. *Id.* § 434(b); 11 C.F.R. § 104.3(a)(4). Any in-kind

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1 contribution must also be reported as an expenditure on the same report.

2 11 C.F.R. §§ 104.3(b), 104.13(a)(2).

3 We conclude that the available information provides an adequate basis for a
4 Commission investigation into whether PUSA funded Cain Committee activities with
5 corporate advances. The documents attached to the Complaint, notably PUSA ledgers
6 itemizing Cain Committee debts to PUSA, support that conclusion, as many of those
7 expenses were apparently incurred during the period that Cain acknowledges he was
8 testing the waters for his candidacy. In addition, the Cain Committee's Response
9 acknowledges both the accuracy of certain expenses identified in the ledgers and that some
10 of those expenses should either have been paid by the Cain Committee itself or disclosed
11 as debts. Ultimately the Cain Committee reported reimbursing the expenses, albeit over a
12 year after incurring them and after the Complaint was filed.

13 The ledgers attached to the Complaint support a conclusion that PUSA funded Cain
14 Committee expenses. The ledgers identify the expended amounts as receivables "due from
15 FOH." See Table 1, *supra*. These receivables are described in some detail, including the
16 specific amount owed and a description of the good or service provided. Further, the
17 ledgers reflect that the debts would have been known to the Cain Committee: at least one
18 invoice was apparently emailed to Cain Committee staff, and two officials, Mark Block
19 and Linda Hansen, appear to be among the control group both at PUSA and the Cain
20 Committee. In addition, the ledgers list a receivable for at least one vendor used by the
21 Cain Committee during the presidential campaign, Hill Aircraft, further suggesting a
22 connection between the identified travel expenses and the Cain Committee. Finally, the

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1 Cain Committee has itself identified furniture that PUSA provided the campaign at no
2 cost. This admission further supports the contention of the complainant that there is reason
3 to believe the Cain Committee owed debts to PUSA that were not reported.

4 In addition, some of the identified expenses were apparently incurred during the
5 period that the Cain Committee acknowledges Cain was testing the waters. According to
6 the Cain Committee's first filed disclosure report, Cain was testing the waters as of
7 December 29, 2010. The ledgers indicate that the iPads were invoiced January 4, 2011,
8 which falls within the testing the waters period. Although the ledgers do not identify dates
9 on which the travel expenses were incurred, they appear among other expenses between
10 December 28, 2010 and January 7, 2011, and accordingly the travel costs were likely
11 incurred during that time as well.⁷

12 Despite the Cain Committee's arguments concerning the authenticity of the
13 ledgers, it acknowledges that some of the identified expenses may have been advances
14 relating to "testing the waters" activities. For instance, the Response acknowledges that
15 during the December 3-4, 2010 "Atlanta meeting," Cain contemplated his candidacy,
16 making those related expenses reportable, and indeed it recently reported reimbursing
17 PUSA for the expenses.⁸

18 The Cain Committee challenges the authenticity of the ledgers on the grounds that
19 the ledgers do not indicate who created them or released them to the press. But more to

⁷ The Cain Committee asserts in its Response that some travel expenses relate to Cain's attendance at Americans for Prosperity events in 2010 and were unrelated to his candidacy. No documentary evidence is available at this time to support that claim, but we will seek to confirm it during our proposed investigation.

⁸ This assertion may also extend the relevant testing the waters period to December 3-4, 2010, from the previously identified December 29, 2010, commencement date.

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1 the point, it does not deny the accuracy of the information described in those ledgers.
2 Indeed, it specifically acknowledges the general accuracy of some of that information.
3 For instance, the Response directly addresses the purchases of iPads and the alleged
4 receivable for travel to Atlanta, both itemized on the ledgers. Response at 3-4. In
5 addition, the amount recently reported by the Cain Committee as disbursed to PUSA and
6 Wisconsin Prosperity Network is the exact amount listed on the ledger for the "Atlanta
7 invoice" and the iPads. We note further that the Respondent that could authoritatively
8 address the authenticity of the ledgers -- that is, PUSA -- did not provide a response to the
9 Commission's notice of Complaint.⁹

10 The Cain Committee also argues that the generalized allegations in the Complaint
11 prevent it from understanding "what actions led to a violation." See Response at 2.
12 We disagree. The allegations in the Complaint make specific reference to Respondents'
13 acts and to relevant provisions of the Act and regulations. The Complaint clearly states
14 that "by accepting payment of campaign expenses by Prosperity USA," the Cain
15 Committee accepted corporate contributions and that the Cain Committee's failure to
16 report the debt was a violation of reporting requirements. Complaint at 5. The ledgers and
17 other attachments are also readily understandable and provide adequate detail for the
18 Respondents to understand the nature of the claims in the Complaint and formulate a
19 response should they choose to do so -- and in fact the Committee did respond.
20 The Complaint and accompanying exhibits present "a clear and concise recitation of the

⁹ According to the Bice Article, two individuals with apparent knowledge each verified the authenticity of the ledgers before the newspaper published its account of the content of the records. See Complaint, Ex. 3.

3 Given the information provided with the Complaint and the Cain Committee's
4 admission in its Response of a number of the relevant facts contained in the Complaint,
5 there is reason to believe that the Cain Committee received corporate contributions from
6 PUSA while Herman Cain was a candidate or while testing the waters for his candidacy.
7 The Cain Committee's recently-filed 2012 April Quarterly report also indicates that the
8 Cain Committee itself regards these expenses as corporate contributions. Thus, we
9 recommend that the Commission find reason to believe that PUSA and Block as its
10 president made, and the Cain Committee received, prohibited corporate contributions in
11 violation of 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2.¹⁰ We further recommend that the
12 Commission find reason to believe that the Cain Committee and Block in his official
13 capacity as treasurer violated 2 U.S.C. § 434(b) and 11 C.F.R. §§ 104.3(a)(4), 104.3(d) by
14 failing to report PUSA's expenditures as in-kind contributions or debts owed to
15 PUSA.¹¹

¹⁰ The Complaint also alleged that PUSA made corporate contributions to the Cain Committee through corporate facilitation. The Act and regulations prohibit corporate officers from facilitating the making of contributions to candidates for federal office. 11 C.F.R. § 114.2(f). In the context of the Act, "corporate facilitation" means using corporate resources or facilities to engage in fundraising for candidates. *Id.* §114.2(f)(1). At this time, we have insufficient evidence that corporate facilitation took place, and accordingly we recommend that the Commission take no action on this theory of violation until we have completed our proposed investigation. Because the period during which Cain was testing the waters and the details of the expenses remain uncertain absent further investigation, we do not recommend a knowing and willful finding at this time.

¹¹ The Cain Committee also recently filed amendments to its 2011 October Quarterly and 2011 Year-End reports, but did not disclose any debt owed to PUSA or Wisconsin Prosperity Network.

2 The Response disputes that \$22,822.98 in travel expenses cited in the Complaint
3 are campaign-related debts. Instead, it contends that the travel was related to
4 pre-candidacy events organized by Americans for Prosperity involving public policy
5 issues, not Cain's candidacy. An investigation is necessary to determine the amount in
6 violation in this matter. That investigation would include discovery requests to the Cain
7 Committee to provide support for its argument regarding the nature of the additional
8 meetings and related travel, including how it distinguishes the December 2010 travel to
9 Atlanta identified on the ledgers, which it admits was campaign related. Further, through
10 PUSA and Block, we would attempt to verify further the authenticity of the ledgers, their
11 accuracy, and the nature of the identified expenses to determine whether they were in fact
12 debts of the Cain Committee. We would also seek clarification regarding the relationship
13 between PUSA and Wisconsin Prosperity Network, and seek to determine whether
14 Wisconsin Prosperity Network should also be generated as a respondent in this Matter.

16 1. Find reason to believe that Friends of Herman Cain, Inc. and Mark J. Block, in
17 his official capacity as treasurer, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2.

19 2. Find reason to believe that Prosperity USA and Mark J. Block, as president,
20 violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2.

22 3. Find reason to believe Friends of Herman Cain, Inc. and Mark J. Block, in his
23 official capacity as treasurer, violated 2 U.S.C. § 434(b) and 11 C.F.R. §§ 104.3(a)(4) and
24 104.3(d).

26 **4. Authorize the use of compulsory process.**

28 **5. Approve the attached Factual and Legal Analyses.**

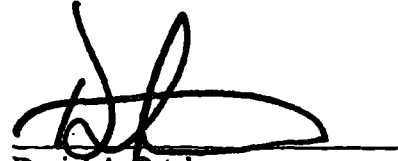
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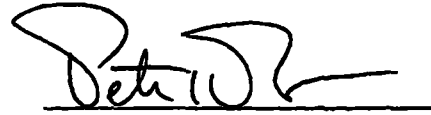
6. Approve the appropriate letters.


Anthony Herman
General Counsel

5/2/12
Date

BY:


Daniel A. Petalas
Associate General Counsel
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